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No. 93-628

In The

Supreme Court of the United States

October Term, 1993

WILLIAM MINEER,

Petitioner,

versus

FLEMING COUNTY, KENTUCKY; FLEMING COUNTY FISCAL COURT; JEWELL CALL, Fleming County Judge/Executive, in his official and individual capacity; and the FLEMING COUNTY FISCAL COURT MEMBERS, Gary C. Harmon, Andy Cole, John Sims, Ronnie Carpenter, William Thompson, and L.C. Cord, in their official and individual capacities,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether, in view of public policy and deeply rooted historical tradition, this Court should reconsider and overrule *Rutan v. Republican Party of Illinois?*

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Opinion of the United States Court of Appeals for the Sixth Circuit entered on May 4, 1993.

JURISDICTION

This Court does *not* have jurisdiction to consider the Petition for Writ of Certiorari herein. The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on May 4, 1993. (*See* Petitioner's Appendix A to Petition for Writ of Certiorari, hereafter "Petitioner's Appendix," p. 1a). Neither Petitioner nor Respondents filed a Petition for Rehearing in the Sixth Circuit Court of Appeals. The 90 days within which Petitioner had to file his Petition for Writ of Certiorari expired on August 2, 1993. Even if a Justice of this Court, for good cause shown, had extended the time to file a Petition for Writ of Certiorari for a period not exceeding 60 days, Petitioner would have had to file his Petition no later than October 1, 1993.

Petitioner attempts to disguise his Petition with the cloak of timeliness by suggesting that the "Final Opinion and Order" of the sixth circuit was entered on September 3, 1993. [Petition for Writ of Certiorari, "Jurisdiction," p. 2]. What Petitioner erroneously refers to as the Final Opinion of the court of appeals was actually an Order, and was not even entered in the case from which Petitioner now seeks a Writ of Certiorari.

After the Opinion of the Sixth Circuit Court of Appeals was entered on May 4, 1993, the district court did not enforce the mandate of the sixth circuit as to County Judge/Executive Jewell Call, hereafter "Call". Consequently, only Call filed a Petition seeking a Writ of Mandamus directing the district court to enforce the sixth circuit's mandate. [*In re: Jewell Call, individually and in his official capacity as Fleming County Judge/Executive,* Sixth

Circuit Docket No. 93-6046, Respondents' Appendix A, p. 1]. Call correctly ascertained the Opinion of the sixth circuit which had reversed the denial of qualified immunity to him on both Petitioner's First Amendment and Fourteenth Amendment due process claims.[1] The district court did not respond to Call's Petition for Writ of Mandamus. Thereafter, on September 3, 1993, the sixth circuit entered an Order directing the district court to take all appropriate steps to enforce its mandate, *per its Opinion of May 4, 1993*, and ordered the Petition for Writ of Mandamus dismissed. (*See* Petitioner's Appendix B, pp. 29a-31a).

There is no authority, either in the United States Code, the Rules of this Court, or in the case law which would allow an automatic extension of time in which to file a Petition for Writ of Certiorari from a final opinion of a federal court of appeals *simply because the Petitioner misunderstood the import of the decision of the court of appeals*. Even Petitioner must readily concede that only one member of the sixth circuit panel, Judge Churchill, was of the opinion that Call was not entitled to qualified immunity. Judge Churchill's opinion could not be understood to have been the Opinion of the Court. 28 U.S.C. § 46(d) provides that "[a] majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum."

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[1] In its May 4, 1993 Opinion, the sixth circuit noted that Petitioner had abandoned his Fifth Amendment claims noting that Petitioner "does not explain how the Fifth Amendment was implicated." (*See* Petitioner's Appendix A, p. 4a, n.1). Likewise, Petitioner has failed to raise any Fifth Amendment claims in his Petition for Writ of Certiorari.

In other words, two of three judges constitute a quorum. *Minniefield v. State of Alabama*, 542 F.2d 947 (5th Cir. 1976); *Wirth Ltd. v. S/S Acadia Forest*, 537 F.2d 1272 (5th Cir. 1976). With respect to Call, two members, or a quorum, of the panel voted in *favor* of qualified immunity. There simply can be no reasonable disagreement that two votes of a three-member panel are sufficient to prevail.

In any event, assuming this Court were to relax the statutes and rules governing its jurisdiction, Petitioner cannot offer his own "confusion" about the Opinion of the sixth circuit to suggest that his Petition, as it relates to the Respondent Magistrates, is timely. *All three* of the panel members of the sixth circuit concurred in their Opinion of May 4, 1993 that the Magistrates were entitled to qualified immunity on both Petitioner's First Amendment and due process claims. By failure to file a timely Petition, certainly Petitioner has waived further review of the grant of qualified immunity to the Respondent Magistrates.

STATEMENT OF THE CASE

The Petitioner's Statement of the Case omits key facts which support the legal grounds upon which the Sixth Circuit Court of Appeals based its Opinion.

Respondents herin collectively constitute the governing body of Fleming County, Kentucky. Respondent Jewell Call is the Chief Executive Officer, known as the County Judge/Executive. Respondents, Harmon, Cole, Sims, Carpenter, Thompson and Cord are the elected

members, known as Magistrates, who comprise the Fiscal Court of Fleming County.

Under Kentucky law, a County Judge/Executive must nominate prospective employees to the Fiscal Court. Thereafter, with the consent of a majority of the Fiscal Court, the person nominated is employed.

Petitioner had been employed as the Fleming County Road Supervisor. The Road Supervisor's employment is governed by Kentucky Revised Statute (KRS) 179.020(2), which provides that the County Road Supervisor "shall be employed by the County Judge/Executive with the consent of the Fiscal Court and who may be removed in the same manner provided for county road engineers." Importantly, Kentucky law also provides that the tenure of county employees cannot extend beyond the tenure of the members of the Fiscal Court which appoints them.[2] Once his lawful term had expired, Petitioner became an employee at will who could be terminated for good cause, for no cause, or for a cause that some might view as morally indefensible.[3]

Petitioner's employment history as the Fleming County Road Supervisor is significant, as it relates to both Petitioner's First Amendment and Fourteenth Amendment due process claims. Petitioner was nominated by former Fleming County Judge/Executive, Bill Owens, in 1978, and approved by the Fiscal Court. As KRS 179.020(7) allowed employment of a County Road Supervisor for a term of either two or four years in the

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[2] KRS 67.710(7); Opinion of the Attorney General 78-432; *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989).

[3] *Firestone Textile Company Division v. Meadows*, Ky., 666 S.W.2d 730, 731 (1984).

discretion of the Fiscal Court, Petitioner was initially appointed to a four-year term, expiring at the end of December, 1981 (coincident with the expiration of the term of the appointing Fiscal Court). In January, 1982, Judge Owens renominated Petitioner as Road Supervisor. The Fiscal Court again approved the nomination for another four years (again, coincident with the term of office of the appointing Fiscal Court).

In January, 1986, Judge Owens once more nominated Petitioner to the Fiscal Court for approval as Road Supervisor. This time, however, the Magistrates voted 5-1 against his reappointment. Petitioner continued to hold the position, albeit unlawfully, as Road Supervisor. In February, 1986, Judge Owens again nominated Petitioner, and the Fiscal Court again voted against him 5-1. Nonetheless, Petitioner continued to work as Fleming County Road Supervisor until September, 1986, when the Fiscal Court voted 3-3 on Petitioner's nomination by Owens. Since Judge Owens was qualified to vote in the event of a tie, Owens broke the tie with his own vote for Petitioner. Petitioner was then appointed to a two-year term (rather than the four-year terms to which he had previously been appointed), which retroactively began in January, 1986, and expired in January, 1988. In January, 1988, Judge Owens failed to submit Petitioner's name to the Fiscal Court for approval, as required by Kentucky law. Even though he had no lawful appointment, Petitioner continued to work as Fleming County Road Supervisor. In May, 1989, Judge Owens lost the primary election for County Judge/Executive to Respondent Call. Several months thereafter, while still in office, Owens once again nominated Petitioner to the Fiscal Court for the position of

County Road Supervisor. Two of the six Magistrates had also lost their primary elections, and along with Judge Owens, would be completing their term of office in December, 1989. Nonetheless, the Magistrates not only approved the nomination, but voted for a four-year term, knowing that the appointment would exceed their own terms of office, an apparent violation of Kentucky law. In fact, the Fleming County Attorney, Frank McCartney, advised the Fiscal Court at that time that, even though they had voted on a four-year term for Petitioner, Petitioner's employment would expire after *two* years, in January, 1990, because one Fiscal Court could not bind the next. In September, 1989, one month after he had been nominated by a lame duck Judge/Executive and approved by at least two lame duck Magistrates, Petitioner decided to run as a write-in candidate against Judge Call for the position of Judge/Executive. Petitioner requested a leave of absence from October 4, 1989 through November 7, 1989 to conduct his campaign. McCartney advised Petitioner that he had written the Attorney General of the Commonwealth of Kentucky, requesting an opinion as to whether a Road Supervisor could run for Judge/Executive while on personal leave of absence from county employment. In October, 1989, the Attorney General's office advised McCartney that the Road Supervisor would have to resign before he could run for county office.

In January, 1990, the newly elected Fiscal court voted not to ratify the action of the former Fiscal Court, which

had supposedly appointed Petitioner to a four-year term, which exceeded the term of the appointing authority.

The evidence adduced of record well supported the consideration of political affiliation in hiring the Road Supervisor. Fleming County, Kentucky is a rural, agricultural community. The Road Supervisor reports directly to the County Judge/Executive, makes recommendations to the Fiscal Court about the most economic utilization of county road funds, is responsible for the daily supervision of the Road Department, is authorized to sign purchase orders that would obligate the county, has the authority to authorize overtime for Road Department employees, makes decisions with respect to the priority of work to be done in the county, and makes recommendations to the County Judge/Executive regarding wages and salaries for Road Department employees. Respondent Cord testified that the construction and repair of county roads was the top priority of county government. Respondent Thompson testified that road construction, repair and maintenance is the main function of Fleming County government. Respondent Call was of like opinion.

Further, without regard to politics, there were many instances of dissatisfaction with the manner in which Petitioner was performing his job as Road Supervisor (apparently, dating back to January 1986, when Judge Owens' third nomination of Petitioner was soundly defeated, some three years before Call ran for office in the primary election). There were complaints that Petitioner could not control the men he supervised, that Petitioner would not go on jobs with his employees, that Petitioner's whereabouts were unknown on days he should

have been working, and that Petitioner did not respond to requests of Fiscal Court members. For most of the time Petitioner was Road Supervisor, jobs would not be completed, or when completed, were done improperly and inefficiently.

Due to the number of complaints about Petitioner, and because of the extensive contact that the Road Supervisor has with the public in Fleming County, Call decided to nominate his own appointee after Fiscal Court voted not to ratify Petitioner's four-year term. Call wanted to appoint someone who could effectively carry out his policies as County Judge/Executive.

Petitioner admitted he knew that a county employee had a right to a hearing when terminated. Nonetheless, Petitioner admitted he never sought a hearing, review or appeal of the Fiscal Court's decision not to ratify his term of employment.

Procedural History

Petitioner commenced his lawsuit in the United States District Court for the Eastern District of Kentucky claiming damages for alleged constitutional violations. His complaint also included pendent state law claims. The district court granted the Magistrates' Motion for Summary Judgment as to Petitioner's First Amendment claims and state law wrongful discharge claims, holding that the Respondent Magistrates had no authority to appoint or re-appoint county employees such as Petitioner, absent nomination by the County Judge/Executive. The district court denied the Magistrates' Motion for Summary Judgment on Petitioner's due process claims,

believing that there was a material issue of fact whether Petitioner had an expectation of continued employment.

With respect to Respondent Call, the district court denied his Motions for Summary Judgment as to both the First Amendment and Fourteenth Amendment due process claims. On appeal, a panel of the Sixth Circuit Court of Appeals unanimously reversed the decision of the district court, and granted qualified immunity to the Magistrates on Petitioner's due process claims:

> Applying the law to the undisputed facts of this case, the members of the fiscal court did not have the legal capacity to deprive Mineer of constitutional rights in connection with his termination.
>
> The sole power of removal was vested in the county's chief executive office. As a matter of law, it is doubtful that the fiscal court would have played a role had Judge Call followed the statute in removing Mineer. Call did not initiate removal proceedings. The fiscal court had no authority to conduct a hearing.

Petitioner's Appendix A, pp. 13a-14a.

Further, *two* members of the panel agreed that the district court erred in denying qualified immunity to Respondent Call on both Petitioner's First Amendment and Fourteenth Amendment due process claims.

The sixth circuit correctly held that the resolution of Mineer's due process claim turned on the proper construction of his property interest under Kentucky law.

The Court then determined that Petitioner had no property interest in his job as Road Supervisor as of January 1, 1990, and therefore, had no due process protection[4]:

> The conclusion of this court in *Christian [v. Belcher*, 888 F.2d 410 (6th Cir. 1988)] that the terms of non-civil service employees expire contemporaneously with that of the outgoing administration remains the most commonsensicle reading of the applicable Kentucky law. *See* OAG 82-63 (absent a merit system, county employees – including the county road supervisor – under a previous administration automatically lose their jobs at the beginning of the new administration); OAG 82-22 (present fiscal court may not bind fiscal court coming into office in January 1982, with a contract for county road supervisor; appointee could only fill out the remainder of the term ending on the second Tuesday of January 1982). Kentucky Revised Statutes Annotated § 179.020(7) has much less relevance than Mineer attempts to give it. The statute gives the county executive the power to employ a county road engineer or supervisor with the consent of the fiscal court. *See* OAG 82-142. Both the county executive and the fiscal court magistrates serve four-year terms. Ky. Rev. Stat. Ann. § 67.050 (magistrates); Ky. Rev. Stat. Ann. § 67.700 (county executive). Thus, the statute serves only to give the county executive and

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[4] In fact, the sixth circuit Opinion recognized that even if Kentucky law were unclear regarding the terms of County Road Supervisors, such that reasonable county officials could disagree on the issue, immunity should attach. Petitioner's Appendix A, p. 20a, n. 1 (citing *Guercio v. Brody*, 911 F.2d 1179 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1681 (1991)).

> the magistrates the flexibility to make either one or two supervisor appointments *during their terms.*
>
> * * *
>
> A coherent reading of the entire statute compels the conclusion that a road supervisor cannot serve a two-year term and then receive a four-year appointment, as was attempted by the incumbents in this case.
>
> * * *
>
> To read the statute otherwise would allow the absurdity that has developed in this case – lame duck magistrates and county executives could appoint officers to terms of office which would bind succeeding popularly-elected administrations. Such a thwarting of the majority will is not commanded by Kentucky law. *Mineer did not have a valid contract which extended his term in office beyond January, 1990.*

Petitioner's Appendix A, pp. 21a-23a (emphasis added).

With respect to Petitioner's First Amendment claim against Respondent Call, the court of appeals held that, "[i]n January 1990, First Amendment law did not clearly establish that a county executive could not refuse to rehire county road supervisors for politically motivated reasons." (Petitioner's Appendix A, p. 25a). In reviewing this Court's reformulation of the inquiry in political affiliation/employment cases, the court of appeals noted that this Court had "abandon[ed] the labels 'policymaker' or 'confidential employee' in favor of asking 'whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.' " Petitioner's Appendix A,

p. 26a (citing *Branti v. Finkel*, 445 U.S. 507, 518, 63 L.Ed.2d 574, 100 S.Ct. 1287 (1980)). More specifically, the court of appeals summarized the state of the law on the issue of politically motivated personnel decisions, characterizing the law as "unsettled." Petitioner's Appendix A, p. 27a (citing *Cagle v. Gilley*, 957 F.2d 1347 (6th Cir. 1992)). In fact, the court of appeals cited its own recent cases holding that "a wide variety of public officials do not enjoy the right to be free from patronage dismissal." Petitioner's Appendix A, p. 28a (citing *Monks v. Marlinga*, 923 F.2d 423 (6th Cir. 1991) (city prosecutor), and *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990) (city attorney)). In sum, the court of appeals held that "[w]hatever the ultimate merits of Mineer's claim, it cannot be said that he had a clearly established right as a county road supervisor to be free from a politically motivated dismissal." [*Id.*]

On remand, the district court refused to enforce the mandate of the sixth circuit, dismissing all of Petitioner's claims against the Magistrates, but retaining jurisdiction over Petitioner's claims against Call. Respondent Call then petitioned for a writ of mandamus seeking enforcement of the Opinion and mandate of the sixth circuit directing the claims against him be dismissed. As noted, *supra*, the sixth circuit did in fact direct the district court to take all appropriate steps to enforce its mandate. *In re: Jewell Call*, Docket No. 93-6046, Petitioner's Appendix B, pp. 29a-31a.[5]

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[5] On November 2, 1993, the district court entered an Order conforming with the mandate of the court of appeals.

REASONS FOR DENYING THE WRIT

I. The Opinion of the United States Court of Appeals Granting Qualified Immunity to Judge/Executive Cal! Relied Upon Established Precedent of This Court.

The rule of law regarding qualified immunity has been affirmatively established by the precedent of this Court. In *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982), this Court held that a public official is entitled to qualified immunity if he acted reasonably in light of established law, i.e., that he had a state of mind free of malicious intention to deprive another of his federally secured rights. *Harlow*, 457 U.S. at 815. In *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987), this Court further elaborated on the qualified immunity standards set forth in *Harlow:*

> [T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear so that a reasonable official would understand that what he is doing violates that right. . . . [I]n the light of pre-existing law, the unlawfulness must be apparent.

Anderson, 483 U.S. at 640.

The sixth circuit correctly identified the appropriate inquiry in cases alleging politically motivated personnel decisions. The court of appeals relied upon this Court's abandonment of the labels "policymaker" or "confidential employee" in favor of asking "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of

the public office involved." Petitioner's Appendix A, p. 26a (citing *Branti v. Finkel*, 445 U.S. 507, 518 (1980)).

In making the particularized inquiry demanded by this Court, the court of appeals noted that the state of the law on the issue of politically motivated personnel decisions was "unsettled." Petitioner's Appendix A, p. 27a (citing *Cagle v. Gilley*, 957 F.2d 1347, 1349 (6th Cir. 1992)). In *Cagle*, the sixth circuit reversed a district court's denial of summary judgment to a sheriff who had failed to rehire former deputies, allegedly due to their election support of an opponent. The sixth circuit concluded that "any sheriff of reasonable competence in [defendant's] position, measured objectively, would [not] have clearly understood that he was under an affirmative duty to have refrained from refusing to reappoint the deputies in August and September, 1988." *Cagle*, 957 F.2d at 1349. It must be recalled that the personnel decision complained of herein by Petitioner occurred in early January, 1990, some six-and-a-half months before the decision of this Court in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111 L.Ed.2d 52, 110 S.Ct. 2729 (1990). The sixth circuit correctly found that it could not be said that Petitioner had a clearly established right in January, 1990, as a county road supervisor to be free from a politically motivated dismissal.[6] Interestingly, Petitioner himself

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[6] The sixth circuit assumed for purposes of qualified immunity that the county road supervisor was in fact subject to a politically motivated dismissal, finding that if it had been clearly established that political considerations were not an appropriate job requirement, then the question whether defendant's dismissal was motivated solely by politics would give rise to a jury question.

recognizes that the law was *not* clearly established despite his protestations to the contrary. Petitioner writes, in support of his argument for the writ:

> The reason this Court should grant this Petition for Certiorari is that, as Justice Powell wrote in his dissent in *Branti, supra,* 'The standard [for politically based firings] articulated by the court is framed in vague and sweeping language. Elected and appointed officials at all levels no longer will know when political affiliation is an appropriate consideration in filling a position.'

Petition for Writ of Certiorari, p. 14 (citation omitted).

Further, Petitioner cites the Opinion of the United States Court of Appeals for the Seventh Circuit in *Upton v. Thompson,* 930 F.2d 1209 (7th Cir. 1991) in a doomed attempt to find support for his Petition:

> So after *Branti,* the test is whether party affiliation is [an] appropriate requirement for effective job performance. Jobs requiring party affiliation for effective job performance may or may not be of the policymaking or confidential variety. That is, between the strictly menial government worker (who under *Elrod* and *Branti,* is clearly and completely protected from patronage firing) and the policymaker/confidential assistant (whose protection from patronage firing is non-existent) *there is a range of government positions for which the propriety of patronage firing has depended largely on the court's juggling of competing constitutional and political values. The results have not been consistent.*

Petition for Writ of Certiorari, p. 15 (emphasis added).

Petitioner's reliance on these authorities only *supports* the denial of the writ, since Petitioner failed to show it was clearly established that he had a "particularized right" to be free from politically motivated firing as the Fleming County Road Supervisor.

Simply put, the issues faced by the United States Court of Appeals for the Sixth Circuit involve questions of law peculiar to the Commonwealth of Kentucky and, more particularly, peculiar to the status, job requirements, and political association appropriate to the job of road foreman. Accordingly, this case does not present questions of conflict among the various circuit courts of appeal, nor is the opinion of the sixth circuit inconsistent with this Court's previous decisions in cases involving either considerations of political affiliation in employment cases, or decisions in cases involving qualified immunity generally.

II. The Opinion of the Sixth Circuit Court of Appeals Correctly Granted the Members of the Fiscal Court Qualified Immunity as to Petitioner's Fourteenth Amendment Due Process and First Amendment Rights, Since the Magistrates Had No Authority to Act Under Kentucky Law and Further, Because Petitioner Had No Property Interest Under State Law Protecting His Right to Continued Employment.

As noted, *supra*, the Respondents believe that this Court does not have jurisdiction to consider the question raised by Petitioner, as Petitioner failed to file a timely Petition for Writ of Certiorari.

In any event, the Sixth Circuit Court of Appeals correctly analyzed both state and federal law in reversing the denial of summary judgment to the Magistrates. Both of Petitioner's claims revolve around questions of state law, which are inappropriate for further review by this Court.

A. Fourteenth Amendment.

The sixth circuit correctly found that Petitioner did not state a Fourteenth Amendment procedural due process claim against the Magistrates because Petitioner had no property right under state law protected by the Fourteenth Amendment. The sixth circuit correctly relied upon KRS 179.020; KRS 67.710(7); Opinion of the Attorney General, OAG 78-432; and its own precedent, *Christian v. Belcher*, 888 F.2d 410, 414 (6th Cir. 1989). Taken together, the foregoing authorities establish that, under Kentucky law, the terms of all county employees expire automatically at the end of each executive administration. The court of appeals thus found that, while a fiscal court could appoint a road supervisor to either a two-year or a four-year term, the fiscal court could *not* appoint a road supervisor to a term of office which would bind succeeding popularly elected administrations. Therefore, Petitioner had no legitimate claim of entitlement to continued employment, and thus no interest protected by the Due Process Clause of the Fourteenth Amendment.

B. First Amendment.

Respondents acknowledge that even an employee with no interest in continued employment protected by

the Fourteenth Amendment Due Process Clause might yet have an interest in being free from political retaliation under the First Amendment. However, in order to prove a First Amendment violation, Petitioner would have to prove the Magistrates had the authority to act with respect to his failure to be re-hired. The sixth circuit correctly found that "[a]pplying the law to the undisputed facts of this case, the members of the fiscal court did not have the legal capacity to deprive Mineer of constitutional rights in connection with his termination." (Petitioner's Appendix A, p. 13a).

The decision of the sixth circuit does not create a conflict among the various circuits, nor does the opinion conflict with any established precedent from this Court. Accordingly, Petitioner has failed to show sufficient reason for granting the writ.

III. Public Policy and Tradition Support Party Affiliation as a Valid Basis For Employment Decisions By Public Officials.

In *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111 L.Ed.2d 52, 110 S.Ct. 2729 (1990), this Court determined that the patronage system is unconstitutional, except when utilized for those jobs for the performance of which, party affiliation is an "appropriate requirement." *Rutan*, 497 U.S. at 64, 111 L.Ed.2d at 60, 110 S.Ct. at 2729. This ruling went against long-standing tradition that was firmly rooted in many areas of public employment.

The Constitution places different restrictions upon the government in its capacity as a lawmaker, than as an

employer. This Court has recognized this in many contexts, with respect to many different constitutional guarantees. For example, in *Kelley v. Johnson*, 425 U.S. 238, 247, 47 L.Ed.2d 708, 96 S.Ct. 1440 (1976), this Court found that, while private citizens cannot be prevented from wearing long hair, policemen could be prohibited. Likewise, in *O'Connor v. Ortega*, 480 U.S. 709, 723, 94 L.Ed.2d 714, 107 S.Ct. 1492 (1987), this Court found that, although private citizens may not have their property searched without probable cause, in many circumstances government employees could be subject to searches. Significantly, private citizens cannot be punished for partisan political activity, but federal and state employees can be dismissed and otherwise punished for that very reason. *Public Workers v. Mitchell*, 330 U.S. 75, 101, 91 L.Ed.2d 754, 67 S.Ct. 556 (1947); *CSC v. Letter Carriers*, 413 U.S. 548, 556, 37 L.Ed.2d 796, 93 S.Ct. 2880 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 616-17, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). Thus, the law has traditionally differentiated between the government as regulator of private conduct and the government in its capacity as an employer.

Patronage was a basis for government employment from the earliest days of the Republic. Then in *Elrod v. Burns*, 427 U.S. 347, 49 L.Ed.2d 547, 96 S.Ct. 2673 (1976), this Court significantly restricted patronage. Nonetheless, patronage continued to be viable, at least to the extent permitted by decisions of this Court. Given that the Constitution's prohibition against laws "abridging the freedom of speech" does not apply to laws enacted in the government's capacity as an employer in the same way it does to laws enacted in the government's capacity as

regulator of private conduct, it is clear that the patronage system is not *per se* unconstitutional.

When the Constitution is ambiguous as to a particular issue, and when the practice in question is not expressly prohibited by the test of the Bill of Rights, but bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, there is no proper constitutional basis for striking it down. This is not to say that tradition can supersede the unambiguous language of the Constitution, but only to suggest that an accepted tradition should not be scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by the Supreme Court.

The proper test in cases such as the one at bar should be whether the governmental advantages of the patronage system reasonably outweigh its coercive effect. When dealing with its own employees, the government may not act in a manner that is patently arbitrary or discriminatory. *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 896, 6 L.Ed.2d 1230, 81 S.Ct. 1743 (1961). But, regulations *are* valid if they bear a "rational connection" to the government end sought to be served. *Kelley v. Johnson*, 425 U.S. 238, 247, 47 L.Ed.2d 708, 96 S.Ct. 1440. In fact, this Court in *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973), upheld restrictions on state employees directed at political expression, which if engaged in by private persons would plainly be protected by the First and the Fourteenth Amendments. Thus, because "government offices could not function if every employment decision became a constitutional matter," *Connick v. Myers*, 461 U.S. 138, 143, 75 L.Ed.2d 708,

103 S.Ct. 1684 (1983), this Court should afford a wide degree of deference to the employer's [government's] judgment that an employee's speech will interfere with close working relationships. *Connick*, 461 U.S. at 152, 75 L.Ed.2d at 708, 103 S.Ct. 1684. Since the government may dismiss an employee for political speech "reasonably deemed by Congress to interfere with the efficiency of the public service," *Public Workers v. Mitchell*, 330 U.S. 75, 101, 91 L.Ed. 754, 67 S.Ct. 556 (1947), it follows *a fortiori* that the government may dismiss an employee for political affiliation if "reasonably necessary to promote effective government." *Brown v. Glines*, 444 U.S. 348, 356, n. 13, 62 L.Ed.2d 540, 100 S.Ct. 594 (1980).

Because this area of constitutional jurisprudence is fraught with ambiguities, the deeply rooted tradition of the American people should be given effect. This Court in many other contexts has given great weight to history and tradition. *See Bowers v. Hardwick*, 478 U.S. 186, 192-194, 92 L.Ed.2d 140, 106 S.Ct. 2841 (1986) (examining consensual sodomy in light of long-standing history and tradition); *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 109 L.Ed.2d 631, 110 S.Ct. 2105 (1990) (considering tradition in evaluating claims that a particular procedure violates the due process clause); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 537, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967) (considering the history of the judicial and public acceptance of the type of search in question when applying the Fourth Amendment's reasonableness test). Therefore, even if tradition is not dispositive of this issue, it should be afforded great weight when applying the aforementioned balancing test.

There are many advantages and disadvantages to the patronage system. The system clearly stabilizes political parties and prevents excessive political fragmentation. The patronage system provides incentives for the public to become involved in the political process; thus, more people become involved in government and the government more aptly reflects the views of the populous. Further, the patronage system stabilizes the party system by encouraging a two-party system. When getting a job is an available incentive for party workers, those attracted by that incentive are likely to work for a party that has the best chance of winning an election rather than some splinter group that has little hope of success. Not only is a two-party system more likely to emerge, but the differences of those parties are likely to be moderated as each party reflects its desire to appeal to the majority of the electorate. In addition, patronage has been a powerful means of achieving the social and political integration of excluded groups. *See e.g., Elrod v. Burns,* 427 U.S. 347, 376, 49 L.Ed.2d 547, 567, 96 S.Ct. 2673, ___ (1976) (Powell, J., dissenting). By supporting and ultimately dominating a particular party, racial and ethnic minorities reap the patronage awards that system has to offer. Thus, the abolition of patronage prevents groups that have only recently obtained political power from following this path of economic and social advancement. The patronage system demands only that the party worker is loyal to the organization itself, rather than a set of political beliefs. The party worker is clearly free to urge *within the organization* the adoption of any political position, but if that position is rejected by the party, he or she is definitely encouraged to vote and work for the party nonetheless.

Thus, even though the patronage system influences or redirects individual political expression and political association, it is not a *significant* impairment of free speech or free association.

The choice in question is not just between patronage and a merit-based civil service, but rather among various combinations of the two that may suit different political units in different areas. Once the courts reject as a criterion a long political tradition showing that party-based employment is entirely permissible, yet are unwilling to replace it with the principal that party-based employment is entirely impermissible, the courts have left the realm of law and entered the domain of political science. Clearly, the appropriate "mix" of party-based employment is a *political question* if there ever was one. Therefore, in light of the long-standing tradition in public policy, and absent a clear constitutional prohibition, the patronage system *cannot* be deemed unconstitutional.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 93-6046

In Re: JEWELL CALL, Individually and
in his official capacity as
Fleming County Judge/Executive

PETITION FOR WRIT OF MANDAMUS

(Filed Aug. 13, 1993)

Petitioners, Jewell Call, individually and in his official capacity as Fleming County Judge/Executive, pursuant to 28 U.S.C. § 1651(a), and Fed. R. App. P. 21(a), by counsel, in support of their Petition for Writ of Mandamus, state as follows:

STATEMENT OF FACTS

William Mineer filed suit in district court for injunctive relief and damages for alleged constitutional violations, pursuant to 42 U.S.C. § 1983. (Exhibit 1). Mineer claimed that the termination of his employment without a pre-deprivation hearing violated his right to procedural due process under the Fourteenth Amendment to the United States Constitution. Mineer also claimed the Petitioners' actions were in retaliation for his political activity, in violation of the First Amendment. Mineer filed suit against Jewell Call, individually and in his official capacity as Fleming County Judge Executive and the Fleming County Magistrates, individually and in their official capacities. Petitioners moved for summary judgment. The district court granted the magistrates' motion as to Plaintiff's claims based on his First Amendment and state law

claims for wrongful discharge. The district court otherwise denied the motion for summary judgment. (Exhibit 2).

Judge Call and the magistrates appealed from the district court Order denying their motion for summary judgment on the issue of qualified immunity. [Sixth Circuit Docket #92-5368]. On May 4, 1993, a three judge panel of this court entered an Opinion and Order. (Exhibit 3). On page 1 of the Opinion, the following appears:

> **James P. Churchill,** Senior District Judge, delivered the opinion of the Court. **Guy,** circuit judge, delivered a separate opinion, concurring in part and dissenting in part, *in which* ***Ryan,*** *circuit judge, concurred.* (Emphasis added).

Judge Churchill opined that the magistrates were entitled to qualified immunity with respect to both the Fourteenth Amendment procedural due process claim and the First Amendment claim. Judges Guy and Ryan both concurred with this result. Judge Churchill did not agree that Petitioner Call individually was entitled to qualified immunity. However, Judge Guy opined that the county judge/executive *was* entitled to qualified immunity on both the Fourteenth and First Amendment claims, and Judge Ryan concurred. *Only* Judge Churchill opined that the county judge/executive was *not* entitled to qualified immunity., Thus, with respect to the county/judge executive, two members of the panel determined that Petitioner Call was entitled to qualified immunity. Consequently, Judge Executive Call, prevailed on *all* claims against him.

On June 2, 1993 the mandate issued from the Sixth Circuit. On June 18, 1993, Defendants, by counsel, served a motion to enforce the mandate in the district court. (Exhibit 4). On July 8, 1993, Plaintiff opposed Defendant's motion to enforce mandate. (Exhibit 5). On July 23, 1993, the district court filed its Opinion, Order, and Judgment. In its Opinion, the district court noted:

> Although the paragraph on page one of the Sixth Circuit's opinion is rather confusing, the Court finds that Judge Churchill's opinion is the opinion of the court. Therefore, all of the Plaintiffs claims against the Magistrates shall be dismissed and judgment entered in their favor. The claims against Defendant Call, however, remain and shall be set for jury trial.

(Exhibit 6).

In its Order, the court stated:

> 3. Assignment of the Plaintiff's remaining claims for jury trial is ***PASSED*** for thirty (30) days so that counsel for the Defendants may take appropriate action to clarify the decision of the United States Court of Appeals for the Sixth Circuit dated May 4, 1993. (Emphasis in original).

(Exhibit 7).

This Petition for Writ of Mandamus followed.

JURISDICTION

It is well established that a petition for writ of mandamus is the proper method by which a court may "construe its own mandate in connection with its opinion; and

if it finds that [a lower court] has erred, or acted beyond its province, in construing the mandate and opinion, to correct the mistake by a writ of mandamus." *Gaines v. Rugg*, 148 U.S. 228, 238, 37 L.Ed. 432, 435, 13 S.Ct. 611, ___ (1893); *see also, General Atomic Co. v. Feltner*, 436 U.S. 493, 56 L.Ed.2d 488, 98 S.Ct. 1939 (1978) (if lower court mistakes or misconstrues decree of higher court and does not give full effect to higher court's mandate, its action may be controlled by writ of mandamus to execute higher court's mandate); *Re N.V. Zind-Hollandsche Scheepvaart Mattschappij*, 64 F.2d 915 (5th Cir. 1933) (misconstruction by lower court of mandate of appellate court could be controlled by mandamus).

STATEMENT OF THE ISSUE PRESENTED

Whether the district court erred in failing to dismiss Plaintiff's complaint in its entirety and failed to enforce the mandate of the United States Court of Appeals for the Sixth Circuit when two out of three judges in a three judge panel of the Sixth Circuit agreed that the county judge/executive was entitled to qualified immunity?

STATEMENT OF THE RELIEF SOUGHT

Petitioner respectfully requests this Court to enter an order directing the district court to act in conformity with the May 4, 1993 Opinion and Order of the Sixth Circuit and in accordance with the June 2, 1993 mandate of the Sixth Circuit, and to enter an Order dismissing Plaintiff's complaint, with prejudice.

STATEMENT OF THE REASONS WHY THE WRIT SHOULD ISSUE

It is clear that, absent some direction or action by the Sixth Circuit, the district court is prepared to assign what it believes are Plaintiff's remaining claims for jury trial. This is so, despite the determination by the Court of Appeals. The three judge panel unanimously agreed that the magistrates are entitled to qualified immunity with respect to both the Fourteenth Amendment procedural due process claim and the First Amendment claim. With respect to Judge Executive Call, Judge Guy stated:

> I dissent on the qualified immunity issue as it relates to the County Executive. I would grant qualified immunity to him on both the Fourteenth and First Amendment claims.

(Exhibit 3, Judge Guy, concurring, page 1). Judge Ryan concurred with Judge Guy. *Only* Judge Churchill opined that the county judge/executive was not entitled to qualified immunity. Judge Churchill's opinion cannot be the opinion of the court. 28 U.S.C. § 46(d) provides:

> A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

In other words, two of three judges constitutes a quorum. *Minniefield v. State of Alabama*, 542 F.2d 947 (5th Cir. 1976); *Wirth Ltd. v. S/S Acadia Forest*, 537 F.2d 1272, 1274 (5th Cir. 1976). Thus, with respect to the county judge/executive, two members of the panel voted in favor of qualified immunity and only one voted against. Consequently, if the district court allowed this case to proceed to jury trial rather than entering an Order of dismissal, the district

court would be acting in conflict with the order and mandate of the Sixth Circuit.

Moreover, to allow this case to proceed to trial, in light of this court's Opinion would violate the principles enunciated by the Supreme Court in *Mitchell v. Forsyth*, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985). As the Court noted in *Forsyth, Harlow [v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982)], . . . recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Mitchell, 472 U.S. at 526, 86 L.Ed.2d 425, 105 S.Ct. at ___.

Again citing *Harlow*, the Court in *Mitchell* noted that, "*Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.' " *Mitchell*, 472 U.S. at 526, 86 L.Ed.2d 425, 105 S.Ct. at ___ (quoting *Harlow v. Fitzgerald*, 457 U.S. at 817, 73 L.Ed.2d at ___, 102 S.Ct. at ___).

Here, the Sixth Circuit has determined that County Judge/Executive Call is entitled to qualified immunity. If County Judge/Executive Call is required to submit to a jury trial, the very circumstances which the Court in both *Harlow* and *Forsyth* predict, will occur. County Judge/Executive Call will be required to submit to a jury trial even though a three judge panel of this Court has determined he is entitled to qualified immunity, an immunity

from suit rather than a mere defense to liability. *See Mitchell*, 472 U.S. at 526, 86 L.Ed.2d at 425, 105 S.Ct. at ___. It is inconceivable to Petitioner that two judges of a three judge panel can rule that a Defendant is entitled to qualified immunity and the case still be permitted to go to trial in the district court. County Judge/Executive Call's qualified immunity will be "effectively lost" if this case is erroneously permitted to go to trial. *Id.* The circumstances in this case rise to the level of the "exceptional circumstances amounting to a judicial 'usurpation of power' [which justifies] the invocation of this extraordinary remedy." *In re Allied Signal, Inc.*, 915 F.2d 190, 191 (6th Cir. 1990) (quoting *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 303 (6th Cir. 1984)).

CONCLUSION

Petitioner respectfully requests this Court to grant its Petition for Writ of Mandamus and direct the district court to enter an Order dismissing Plaintiff's complaint, with prejudice.

Respectfully submitted,

/s/ R. Thaddeus Keal
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CERTIFICATE

It is hereby certified that a true copy of the foregoing was served upon, by mail, this the 12th day of August, 1993, to:

Original plus 5 copies to:

Clerk, U.S. Court of Appeals
for the Sixth Circuit
538 U.S. Post Office & Courthouse
5th & Walnut Streets
Cincinnati, Ohio 45202

Copies to:
Honorable Thomas M. Troth
Honorable John Swinford
Post Office Box 397
Cynthiana, Kentucky 41031

Honorable John C. Price
Fleming County Attorney
Courthouse, Court Square
Fleminsburg, Kentucky 41041

Judge Karl S. Forester
United States District Court
Eastern District of Kentucky
at Lexington
P.O. Box 2165
Lexington, Kentucky 40595

/s/ R. Thaddeus Keal
R. THADDEUS KEAL